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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-343

JILL S. LOESER, LEONARD R. SCHEYER and GLADYS SCHEYER,

Petitioners,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ARTHUR MORSE
29 South LaSalle Street
Chicago, Illinois 60603

JOSEPH WINSLOW BAER,
DAVIS, JONES & BAER
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

Of Counsel:
SIDNEY Z. KARASIK
135 South LaSalle Street
Chicago, Illinois 60603
STate 2-0588

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below ..... 1, App. 1-5

Jurisdiction 2

Questions Presented 2

Statement 3-4

Reasons For Granting The Writ 5-16

Conclusion 16

CITATIONS

Cases

Armstrong v. Manzo, 380 U.S. 545 13

Bell v. Burson, 402 U.S. 535 13

Boddie v. Connecticut, 401 U.S. 371, 378 9

Clemens v. Dist. Court, 390 P. 2d 83 (Colo.) 11

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424-425 ..... 9, 13

Ford v. Ford, 371 U.S. 187, 192 15

Freedman v. Poirer, 134 Misc. Rep. 253, 236 N.Y.S. 96, Aff'd 237 App. Div. 320, 237 N.Y.S. 618, 620 10

Fuentes v. Shavin, ... U.S. ....., 32 L. Ed. 556 13

Goldberg v. Kelly, 397 U.S. 254 13

Griffin v. Griffin, 327 U.S. 220 10

Grote v. Rogers, 149 A. 547 (Md.) 10

Halvey v. Halvey, 330 U.S. 610 15

Hess v. Pawlowski, 274 U.S. 372, 487 S. Ct. 362 6

Hohenadel v. Steele, 237 Ill. 229, 235 15

PAGE

International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 160 6,8

Kimbrough v. Sullivan, 266 N.E. 2d 717, 720 Ill. App. 1971 9

McDonald v. Mabee, 243 U.S. 92, 37 S.Ct. 343 .....6, 7, 10

McGee v. International Life Insurance Co., 355 U.S. 220 8

May v. Anderson, 345 U.S. 528, 534 .....9, 14, 15

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 7,9

Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 5

Newman v. Greeley State Bank, 92 Ill. App. 638 9

Pennoyer v. Neff, 95 U.S. 715 .....6, 10

Phillips v. Anchor Hocking Glass Corp., 100 A. 212, 251, 413 P. 732, 735 11

Sniadach v. Family Finance Corp., 395 U.S. 337 13

Travellers Health Assn. v. Virginia, 339 U.S. 643 7

United States v. Gonzales, 348 U.S. 407 13

Walker v. Hutchinson, 352 U.S. 112 7

Wise v. Herzog, 114 F. 2d 486, 491 9

Wisconsin v. Constantineau, 400 U.S. 433 13

Wuchter v. Pizzutti, 276 U.S. 13, 24-25 9

PAGE

STATUTES

Arizona: Rule 4(e)(2)(a) Rules of Civil Procedure, 16 ARS 5

Arkansas: Ark. Stats. Ann. Sec. 27-2503A, 16 Supp..... 5

Michigan: Mich. Stats. Ann. Sec. 27A, 1913-1920-1923 (1962) 5

Louisiana: La. Rev. Stats. Sec. 13-3205 (1968) 5

Maryland: Md. Rules of Procedure, R. 107a(2) 1967 Supp. to Vol. 9B 5

Illinois Long Arm Statute, Ill. Rev. Stats. 1969, chap. 110, §17(b) 5

Indiana Trial Rule 4.11 (App. B) 6

Michie's Code of Va., Sec. 3848 (510)(55) 6

Illinois Habeas Corpus Act (Ill. Rev. Stats. 1969, chap. 65, sec. 19) 12

TEXTS

42 Am. Jur. PROCESS, §67, p. 57 7

Antieau, MODERN CONSTITUTIONAL LAW, Vol. 1, p. 541.. 7

94 L. Ed. 1167, Ann. "Developments of the Doctrine of *Pennoyer* v. *Neff* as regards jurisdiction over non-resident individuals" 7

MISCELLANEOUS

1962 Handbook, National Conference of Commissioners of Uniform State Laws 219-241, §2.01(b) 5

Kurland "The Supreme Court, The Due Process Clause and In Personam Jurisdiction" 25 Univ. of Chicago L. Rev. 569 11

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NO.

JILL S. LOESER, LEONARD R. SCHEYER and GLADYS SCHEYER,

Petitioners,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in this cause, on May 22, 1972.

OPINION BELOW

The opinion of the Supreme Court of Illinois, reported ..... Ill. 2d ....., 283 N.E.2d 884 is reprinted in Appendix "A" hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 27, 1972. A petition for rehearing was denied on June 15, 1972.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). Questions under the United States Constitution sought to be reviewed by this Court were timely and properly raised in the Court below.

QUESTIONS PRESENTED

1. Whether an Indiana divorce decree, awarding child custody to an Indiana father in an *ex parte* proceeding, was in accordance with the Due Process clause of the Fourteenth Amendment, and entitled to Full Faith and Credit under Article IV of the U. S. Constitution, in view of the Indiana "long arm" statute permitting out-of-state service by mail, without restricting delivery to the named party defendant.

2. Whether a summary habeas corpus proceeding in Illinois without affording petitioners an opportunity to file responsive pleadings or to adduce evidence at a hearing, violated the Due Process guarantee of the Fourteenth Amendment.

3. Whether the Illinois Court under the *parens patriae* doctrine had the responsibility of conducting an evidentiary hearing as to the best interests and welfare of a minor child before peremptorily transferring custody from his mother, residing in Illinois, to his father, a resident of Indiana.

STATUTE INVOLVED

The pertinent provisions of the Indiana "long arm statute" are set forth in Appendix "B" hereto and are quoted in the opinion of the Illinois Supreme Court, Appendix "A", pp. App. 4 and 5.

STATEMENT

Julius and Jill Loeser, husband and wife, resided in Terre Haute, Vigo County, Indiana, with their three-year old son, Jeffrey. Following a domestic quarrel in March 1971, the husband voluntarily took the child to the wife's parents, Leonard and Gladys Scheyer, whose home is located at 911 Thackery, in Highland Park, Illinois.

Four days later, Jill Loeser moved to her parents' Highland Park home, in order to care for her young son, and she continued to reside with her parents and Jeffrey in Highland Park at the Thackery address. (R. 24).

On April 19, 1971, while Jill and the child were still residing at the Highland Park home of her parents, Julius filed for divorce in the Superior Court of Vigo County, Indiana. The alleged grounds were "cruel and inhuman treatment by a wife towards the husband and adultery." The complaint alleged that Jill was "not a fit and proper person for the care and custody" of Jeffrey, and prayed custody. (R. C8, 27). Neither the child nor the Scheyers were parties to the Indiana action.

Pursuant to the Indiana "long arm" statute, the summons and divorce complaint purportedly were sent to Highland Park, Illinois by mail for service upon Jill Loeser. (R. C7).

The mailed divorce process was in fact not received nor receipted by Jill, but by her mother, Gladys Scheyer at another Highland Park address, which was not the home or

usual place of abode of either Jill or Mrs. Scheyer. (R. 13, 91). (The Illinois Supreme Court assumes, without support in the record, that Jill learned of the Indiana proceedings by that service).

No appearance was filed on behalf of Jill and the Indiana court proceeded to grant an *ex parte* divorce to Julius and to award him custody of the minor child. The decree was entered June 21, 1971. (R. C9).

Seven days later Julius filed a petition for a writ of habeas corpus in the Circuit Court of Lake County, Illinois, joining Jill Loeser and her parents Leonard R. and Gladys Scheyer as parties respondent and attached a copy of the Vigo County divorce decree which awarded him "sole care, custody, control and education of Jeffrey Michael Loeser". (R. C9).

The request of Jill and her parents for leave to file responsive pleadings to the habeas corpus petition was denied. Likewise their request for a "de novo" hearing on the question of custody and for leave to introduce evidence as to the mother's fitness was denied.

On July 8, 1971 the Illinois court pre-emptorily ordered the turn over of the child to Julius on the ground that the Indiana decree was entitled to full faith and credit, and that the lapse of time between the Indiana decree (June 21) and the argument on the habeas corpus petition (July 8, 1971) was "too short a period" to indicate any "change of circumstances". (R. 9-10, 86).

The Supreme Court of Illinois affirmed the Lake County judgment. It rejected petitioners' challenge to the Indiana "long arm" statute and their deprivation of the right to plead and to be heard in an evidentiary hearing in the Lake County circuit court.

REASONS FOR GRANTING THE WRIT

I.

THE INDIANA "LONG ARM" STATUTE OFFENDS DUE PROCESS BECAUSE IT DOES NOT REQUIRE RESTRICTED MAIL DELIVERY AND WAS NOT ENTITLED TO FULL FAITH AND CREDIT BY THE ILLINOIS COURTS.

(a) The Indiana mail long arm statute is unique.

Although State long arm statutes are now commonplace, only a hand full of state statutes provide for direct mailing of service to out-of-state defendants[1] as the sole means of acquiring *in personam* jurisdiction.[2]

With the sole exception of Indiana, states which do have long arm mail statutes require registered or certified mail *with delivery restricted to the named defendant.*

The proposed Uniform State Long Arm statute contains such a provision, viz:

> "When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of *personal delivery to the addressee,* satisfactory to the court." (1962 Handbook, National Conference of Commissioners of Uniform State Laws 219-241, §2.01(b).

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[1] *Viz.*, Arizona: Rule 4(e) (2) (a) Rules of Civil Procedure 16 ARS; Arkansas-Ark. Stats. Ann. Sec. 27-2503A, 16 Supp.; Michigan-Mich. Stats. Ann. Sec. 27A, 1913-1920-1923 (1962); Louisiana-La. Rev. Stats. Sec. 13-3205 (1968); Maryland-Md. Rules of Procedure, R. 107a(2) 1967 Supp. to Vol. 9B.

[2] See: Illinois long arm statute, Ill. Rev. Stats. 1969, chap. 110, §17(b) which requires personal service on an out-of-state defendant. See *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673.

The Indiana statute here in question, however, is unique in that, although service is initiated by registered or certified mail, delivery need not be restricted to the addressee.[3]

Under the Indiana statute acceptance of the mail by a person other than the addressee is sufficient to give the Indiana court *in personam* jurisdiction over the defendant.[4]

The constitutional requirement for service outside of the state of the forum is that the method of service provided for shall give "reasonable assurance that the notice will be actual." (*International Shoe Co.* v. *Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160; *Hess* v. *Pawlowski*, 274 U.S. 372, 487 S. Ct. 362; *McDonald* v. *Mabee*, 243 U.S. 92, 37 S. Ct. 343.

From *Pennoyer* v. *Neff*, 95 U.S. 715, to *International Shoe* is a history of expanded recognition of a State's power to acquire *in personam* jurisdiction over non-residents.

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[3] See Appendix B. Prior to the 1970 amendment to the Indiana statute, provision was made for "substitute" mail service upon persons of suitable age and discretion "other than the named defendant." How the postman purporting to act as a sheriff could make this determination is not specified. The 1970 amendment eliminated the "substitute" provision, but still did not require restriction of delivery to the named addressee.

The fact that Jill Loeser in the instant case may have learned of the pendency of the Indiana divorce proceedings was due to mere happenstance that the person receiving and receipting the registered letter passed on the information.

Cf. typical non-resident motorist or securities regulation statute which empowers secretary of state to accept service; and who then mails notice by registered mail. Michie's Code of Va., Sec. 3848 (510)(55).

[4] Indiana Trial Rule 4.11 (App. B).

See: *Travellers Health Assn.* v. *Virginia*, 339 U.S. 643; Ann. "Developments of the Doctrine of *Pennoyer* v. *Neff* as regards jurisdiction over non-resident individuals" etc., 94 L. Ed. 1167. Although the historic trend has been to liberalize "substituted service", such statutes have always been subject to the test of the Due Process Clause.

As stated in 42 Am. Jur. Process, §67, at p. 57:

> "The efficiency of substituted or constructive service of process, when allowable, rests upon the presumption that notice will be given in a manner which is calculated to impart knowledge to the person who is to be notified. Its adequacy, so far as due process of law is concerned, is dependent upon whether or not the particular form of service is reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard."

But in *McDonald* v. *Mabee*, 243 U.S. 92, 37 S. Ct. 343, a more rigorous test was asserted. In that opinion Mr. Justice Holmes said:

> "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to facts. . . To dispense with personal service, the substitute *that is most likely to reach the defendant*, is the *least* that ought to be required, if substantial justice is to be done." (Emphasis added).

The "most-likely-to-reach-the-defendant" test was also insisted upon in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 ("Notice reasonably calculated, *under all circumstances* to apprise interested parties"), and in other "service by publication" cases, e.g. *Walker* v. *Hutchinson*, 352 U.S. 112. Scholars and critics have urged the Court to return to that due process standard. See, Antieau, Modern Constitutional Law, Vol. 1, p. 541.

The constitutional infirmity of the Indiana long arm statute is that it not only substitutes personal service by mail service, but unlike all other long arm statutes providing for mail service, there is no requirement of personal delivery to the addressee. The Indiana Court proceeded to enter an ex parte judgment as to custody of an out-of-state child without a showing of service made upon the mother (the only named defendant).

Citing *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and *International Shoe Co.* v. *Washington*, 326 U.S. 310, the Illinois Supreme Court in the instant case asserts that the Indiana statute and rules meets constitutional test of due process if there is "reasonable assurance that notice will actually be given"—a criteria which is far less rigorous in requiring the substitute for personal service "that is most likely to reach the defendant." It is respectfully submitted that the Illinois Court's treatment of a vital question affecting the due process requirements of the Indiana long arm statute is cursory, superficial and unsatisfactory.

Lightly hurdling the constitutional question, the Illinois Supreme Court observes:

> "The record shows that notice of the hearing date of the Indiana divorce proceeding was served on Illinois counsel representing Jill Loeser." (App. A, p. App. 3).

Sending copies of *pre-judgment* pleadings to an attorney for a party is invalid service of process absent a showing that the attorney was authorized to accept such service. The mere fact that Jill Loeser became aware of the pendency of the Indiana divorce suit, did not subject her

to *in personam* jurisdiction of the Indiana court. *Wuchter* v. *Pizzutti*, 276 U.S. 13, 24-25; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424-425; ("Knowledge of the pendency of a suit has never . . . been deemed equivalent to service of summons") *Newman* v. *Greeley State Bank*, 92 Ill. App. 638)

The criterion of constitutional validity of a long arm statute may depend upon the type of proceeding involved, and the nature of the right to be adjudicated. (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313. The validity of the form of notice "depend[s] upon the importance of the interests involved and the notice of the subsequent proceedings." (*Boddie* v. *Connecticut*, 401 U.S. 371, 378).

The rationale for permitting service by mail is the ease, economy and speed which that type of process supposedly provides. Service by mail in a small money claim may not offend the due process clause (*Wise* v. *Herzog*, 114 F. 2d 486, 491), but the instant case presents a question of the most precious of personal rights—the right of a mother to her child. (*May* v. *Anderson*, 345 U.S. 528, 534). Service by mail is wholly inappropriate to the latter claim.

The objective of providing an inexpensive and convenient method of service does not justify an unrestricted delivery by mail. Absent the requirement of *restricted delivery*, service even by registered or certified mail, is an uncertain method of notice. Judicial notice of the increasing uncertainty and "possibilities of loss in the mails", i.e., that the mails no longer function adequately, has been noted by at least one court. (*Kimbrough* v. *Sullivan*, 266 N.E. 2d 717, 720 Ill. App. 1971).

A restriction of delivery, e.g., to the addressee only—would not materially add to the expense of service by mail, but would vouchsafe actual receipt of notice by the party

to be served. Yet, this simple and inexpensive safeguard is conspicuously lacking in the Indiana statute. In the context of the instant case where the Indiana court sought to reach a non-resident mother, to adjudicate her right to custody of a child who was not present in the State of Indiana, the Indiana long arm statute was clearly constitutionally deficient.

(b) A judgment of one state is entitled full faith and credit only if it satisfies the requirements of the due process clause.

A judgment of one state is entitled to full faith and credit only if it satisfies the requirements of the Due Process Clause; if it does not meet those requirements, it is not properly enforcible even within the State rendering it. *Pennoyer* v. *Neff*, 95 U.S. 714; *Griffin* v. *Griffin*, 327 U.S. 220. In *Griffin*, the Court held that due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process of law.

Under the "most-likely-to-reach the-defendant" test as proclaimed in *McDonald* v. *Mabee*, 240 U.S. 92, 37 S. Ct. 343, *supra*, a number of state statutes providing for mail service on non-resident motorists have been stricken down as violative of due process, and hence not entitled to full faith and credit. See *Freedman* v. *Poirer*, 134 Misc. Rep. 253, 236 N.Y.S. 96, 100 aff'd 237 App. Div. 320, 237 N.Y.S. 618, 620; *Grote* v. *Rogers*, 149 A. 547 (Md).

Although not involving a full faith and credit problem, the Colorado Supreme Court struck down a Colorado Non-Resident Motorist Statute providing for service on non-resident motorists by registered mail, which failed to pro-

vide for an accounting of the disposition of the receipt—i.e., an absence of a requirement that the defendant either sign or refuse delivery of the mail summons. The Colorado Court held the statute unconstitutional because of the uncertainty of the notice. *Clemens* v. *Dist. Court*, 390 P. 2d 83 (Colo.).

A long arm statute is an extraterritorial extension of a state's power to adjudicate *in personam* rights of a resident of another state, or of a non-resident person. In a federal system, the sensitive concern of this Court is that the forum state's power through such device is not an encroachment on the resident state. (*Phillips* v. *Anchor Hocking Glass Corp.*, 100 A. 212, 251, 413 P. 732, 735, citing Kurland "The Supreme Court, The Due Process Clause and In Personam Jurisdiction" 25 Univ. of Chicago L. Rev. 569. Liberality in according full faith and credit to the Indiana judgment in the circumstances of the instant case should be tempered by that consideration.

II.

PETITIONERS WERE DEPRIVED OF DUE PROCESS IN BEING DENIED THE RIGHT TO FILE RESPONSIVE PLEADINGS AND THE RIGHT TO AN EVIDENTIARY HEARING ON THE HABEAS CORPUS PROCEEDINGS IN ILLINOIS.

If the basis of the Illinois Court's holding is that Jill Loeser had been given adequate notice and an opportunity to be heard in Indiana, and that the Indiana decree was therefore "res judicata", that rationale cannot be extended to the other petitioners. The maternal grandparents, Leonard and Gladys Scheyer, who were voluntarily given physical custody of the minor child by Julius Loeser, were

never parties to the Indiana proceedings. The Indiana court did not purport to decide *their* rights, and the Indiana court would not have had jurisdiction to do so. It is clear beyond peradventure, therefore, that the Indiana custody decree could not be "res judicata" as the Illinois Court asserts, as to the Scheyers.

The Scheyers, however, were made parties to the Illinois habeas corpus proceedings. *They,* at least, were entitled: (1) to file responsive pleadings to show the circumstances of their acquisition of custody and their right to continue custody; (2) to an evidentiary hearing on their right to custody, irrespective of the Indiana decree. Minimal due process required no less. They were given neither.

Even if the Indiana decree was *res judicata* as to Jill Loeser, she too, was entitled to file responsive pleadings[5] to the Illinois petition for habeas corpus and to a meaningful hearing thereon.

She should have been accorded the right to introduce evidence, tendered by her, to the effect that the Indiana custody decree was based on facts or information withheld or unknown to the Indiana Court, or the change in circumstances subsequent to the Indiana decree which entitled her to custody.

Instead of affording Jill and her parents of an opportunity to file pleadings and to present evidence, the "hearing" by the Illinois circuit court was devoted ex-

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[5] Although habeas corpus is regarded as a "summary proceeding" even under the Illinois Habeas Corpus Act (Ill. Rev. Stats. 1969, chap. 65, sec. 19) an interested party may make an answer or denial of material facts and to adduce evidence in opposition to habeas corpus.

clusively to argument by counsel as to whether the habeas corpus respondents were entitled to those elementary rights.

It is fundamental due process doctrine that the deprivation of a property right, whether a "necessity" or not, and surely a human right such as custody of a child, must be preceded by an opportunity for a hearing. *Armstrong* v. *Manzo*, 380 U.S. 545; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433.

This court has applied Fourteenth Amendment protection to "non-final" deprivations of property. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337; *Fuentes* v. *Shevin*, ... U.S. ....., 32 L. Ed. 2d 556. *A fortiori* that protection must be accorded to a final or indefinite deprivation such as custody of a child.

It is equally settled constitutional doctrine that "the right to a hearing means a right to a meaningful hearing" (*United States* v. *Gonzales*, 348 U.S. 407) and that the right to be heard means the "right to present evidence" (*Goldberg* v. *Kelly*, 397 U.S. 254).

The Illinois Supreme Court, in striking down the instant petitioners' contentions, implies that a de novo hearing by the Illinois court on the issue of custody could not have altered the entitlement of the Indiana judgment to enforcement. In so holding the Illinois court overlooks a rather fundamental constitutional principle announced recently by this Court in *Fuentes* v. *Shevin*, ... U.S. ....., 32 L.Ed. 556 at p. 574:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law

would have led to the same result because he had no adequate defense upon the merits' (*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424). It is enough to invoke the procedural safeguards of the Fourteenth Amendment, that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."

Protection which this court gave in *Fuentes* to "continued possession and use of . . . goods" surely must extend to continued possession of a child.

III.

UNDER THE PARENS PATRIAE DOCTRINE, THE ILLINOIS COURT HAD THE RESPONSIBILITY OF CONDUCTING AN EVIDENTIARY HEARING AS TO THE BEST INTERESTS AND WELFARE OF A MINOR CHILD.

Whatever the legal context, the welfare and best interests of a minor child are always the paramount concern of a court. Under the doctrine of *parens patriae*, even concepts of comity and full faith and credit yield to the resolution of this "elemental question". *May* v. *Anderson*, 345 U.S. 528, 533.

In its determination to enforce the Indiana judgment as to custody, the Illinois court breached its responsibility and abrogated its power to inquire into the best interests of a child which was physically within its jurisdiction, and which, significantly, had not been within the jurisdiction of the sister state rendering the judgment.

The Illinois court was tendered the transcript from the Indiana divorce trial which conclusively showed that the Indiana court had not only heard no evidence on the ques-

tion of the relative fitness of each parent to have custody of the child, but that the Indiana trial judge pointedly remarked: "We are trying a divorce case here, and not a hearing on custody in the future." (R. 71).

Even if the Indiana court had made a full and careful inquiry on the questions of fitness, custody and welfare, it is fundamental that the Illinois court had both the power and obligation to inquire into the right to custody and concomitant best interests of the child. (*May* v. *Anderson,* 345 U.S. 528). The fact that the Indiana court had not done so made it imperative that the Illinois court order such inquiry. In controversies involving custody of children "the public interest is strong," and supersedes parental differences or agreements. *Ford* v. *Ford,* 371 U.S. 187, 192.

The twin doctrines of full faith and credit (mandated by the Constitution) and comity (founded on public policy) are exalted versions of the more common place rule of *res judicata*: One state enforces the judgments of another state because the same subject matter should not be relitigated between the same parties.

But a decree awarding custody of a minor child is always "exceptional in character and is always regarded as temporary." (*Hohenadel* v. *Steele,* 237 Ill. 229, 235). By its nature, such a decree lacks the quality of finality which would prevent the court rendering it from altering a decree at any time as circumstances require. Hence, also, another court acquiring physical jurisdiction of a child is never so fettered by the decree of a sister state that it will not make an "independent determination" of the infant's best interests. What the original state could do, the second state may likewise do. (*Halvey* v. *Halvey,* 330 U.S. 610; *Ford* v. *Ford,* 371 U.S. 187; *May* v. *Anderson,* 345 U.S. 528).

The alleged short time span between the Indiana judgment and the Illinois petition for habeas corpus should not have been conclusive on the question whether or not there was sufficient change of circumstances. The very transfer of the child from one state to another was itself a substantial change, which justified a redetermination of the child's best interests. But in the light of other evidence tendered by the instant petitioners to show facts unknown or withheld from the Indiana court and a change in circumstances affecting the mother's fitness to care for the child, there was more than a sufficient showing to justify a *de novo* hearing in Illinois. Hence, the responsibility of the Illinois court was not foreclosed by the prior adjudication.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that a Writ of Certiorari be granted.

Respectfully submitted,

ARTHUR MORSE
JOSEPH WINSLOW BAER
Attorneys for Petitioner

Of Counsel:
SIDNEY Z. KARASIK

APPENDIX A

Opinion of the Supreme Court of Illinois.

Docket No. 44520—Agenda 29—March, 1972.

JULIUS LOESER, Appellee, v. JILL S. LOESER *et al.*, Appellants.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Respondents, Jill Loeser, Leonard R. Scheyer and Gladys Scheyer, appeal from the judgment of the circuit court of Lake County awarding a writ of *habeas corpus* which directed that Jeffrey, the three-year-old son of petitioner, Julius Loeser, and the respondent Jill Loeser be placed in the custody of the petitioner.

The record shows that petitioner, Julius Loeser, and the respondent Jill Loeser were married in Chicago in 1965 and throughout the period of their marriage resided in Terre Haute, Indiana. The respondents Leonard R. Scheyer and Gladys Scheyer, residents of Lake County, are the parents of respondent Jill Loeser. Jeffrey was born in January 1968.

The Loeser's marriage was beset with difficulties and in the early part of 1971 appeared to be in danger of termination. Because of the tensions in their home they agreed that it would be advisable that Jeffrey visit with his maternal grandparents while they sought a solution to their problems and on March 26, 1971, petitioner brought Jeffrey to the home of the respondents Scheyer, in Highland Park. Petitioner alleges that it was agreed between the parties that Jeffrey would be returned to Terre Haute in three weeks but the respondents dispute the allegation. On March 30, 1971, apparently without notice to

petitioner, respondent Jill Loeser departed Terre Haute and moved to her parents' home in Highland Park. It is not clear from the record whether she intended the removal to Illinois to be temporary or permanent.

On April 19, 1971, petitioner filed suit for divorce in Vigo County, Indiana. Service of process was effected by means of the Indiana "long arm" statute. On June 21, 1971, the divorce action was heard and a decree rendered and entered which *inter alia* found that petitioner was a fit person to have custody of Jeffrey and awarded him custody of the child. The decree shows that the respondent did not appear in the divorce action, and it was heard as a default matter.

The petition for *habeas corpus* was filed in the circuit court of Lake County on June 28, 1971, and the judgment from which the respondents appeal was entered on July 8, 1971.

Respondents contend that "irrespective of the Indiana decree awarding custody to the father, the Illinois circuit court had both the responsibility and the power to conduct an evidentiary hearing to determine the best interests and welfare of the child, and it was error not to have done so." They argue that since the Indiana court heard no testimony relevant to petitioner's fitness to have custody of the child, the court should have considered the issue *de novo* for the purpose of determining whether there were circumstances not known to the Indiana court or changes in circumstances which would affect the best interests of the child. Further, they argue that because Jeffrey, at the time when the Indiana decree was entered, was not in Indiana but was in fact in the custody of his maternal grandparents, the respondents Scheyer, who were not parties to the Indiana proceeding and not subject to the jurisdiction of the Indiana court, an evidentiary hearing

was required. They also contend that the trial court denied respondents' repeated requests for reasonable time in which to file responsive pleadings so "that issues could be framed prior to a meaningful hearing on the petition for *habeas corpus.*"

In *People ex rel. Bukovich* v. *Bukovich,* 39 Ill.2d 76, we said at page 79: "The courts of Illinois have both the responsibility and the power to inquire into the right to custody and concomitant best interests of a child within the jurisdiction where the passage of time since a prior custody determination of a sister State makes it possible that the circumstances pertaining to the fitness of the parties seeking to be awarded custody of the minor may have substantially changed." The decision as to whether the power should be exercised here is dependent upon consideration hereinafter discussed.

The record shows that respondent Jill Loeser had ample opportunity to defend the action in Indiana. In colloquy in the trial court and in respondents' brief it is admitted that she received a summons and a copy of the complaint. The record shows that notice of the hearing date of the Indiana divorce proceeding was served on Illinois counsel representing respondent Jill Loeser and that an Indiana attorney appeared at the hearing and upon interrogation advised the court that he had been retained by her Illinois counsel "to consult with him," that he had been advised by her Illinois counsel that no one would appeal for her and that he was there as an "observer."

Under Indiana law the provision of the decree awarding custody of Jeffrey to the petitioner was *res judicata* and in order to justify a change of custody there must have been a change in conditions of such character as to make the change of custody necessary for the welfare

and happiness of the child. (*Brickley* v. *Brickley* (1965), 247 Ind. 201, 210 N.E.2d 850.) It is true that the Indiana court did not hear testimony specifically directed toward the question of petitioner's fitness to have custody of the child. We note, however, that although his fitness to have custody was not made an issue in the case, there is nevertheless, sufficient testimony to support the court's finding.

With respect to respondents' contention that they should have been given time to file responsive pleadings, the record fails to reflect what issues would have been "framed" for determination in a "meaningful hearing," and upon the record before us we hold that the circuit court did not err in awarding the writ without an evidentiary hearing.

Respondents contend next that the Indiana decree is invalid for the reason that the statute and rules under which service of process was effected are in derogation of Illinois law and offend due process in that they do not require "restricted mail delivery." Rule 4.1 of the Indiana Rules of Trial Procedure provides for service of process by "sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter." Rule 4.4 provides: "Any person * * * that is a nonresident of this state, a resident of this state who has left the state, * * * submits to the jurisdiction of the courts of this state as to any action arising from the following acts * * * living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the

state. • • • *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons: (1) As provided by Rules 4.1. • • • " Trial Rule 4.11 provides: "Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court • • • shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court • • • shall show the date and place of mailing, a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become part of the record. If a mailing by the clerk is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service."

The requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance that notice will actually be given and the person against whom the action is brought is given reasonable time to appear and defend on the merits. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199; *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.Ed.95, 66 S.Ct. 154.) Service as effected under the Indiana statute and rules meets this test, and due process does not require precise compliance with the allegedly more stringent requirements of the Illinois statute and the rules of this court.

We find no basis for reversal and the judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.

APPENDIX B

INDIANA

RULES OF TRIAL PROCEDURE

I. Scope of Rules—One Form of Action

Trial Rule 1

SCOPE OF THE RULES

Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action.

II. Commencement of Action; Service of Process

* * *

Trial Rule 4

PROCESS

(A) *Jurisdiction over parties or persons—In general.* The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

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* Reprinted in Special Supplement to Burns Annotated Indiana Statutes Vol. 2, Part 1. (The Bobbs-Merrill Co. Inc., 1970)

Trial Rule 4.1

SUMMONS: SERVICE ON INDIVIDUALS

(A) *In general.* Service may be made upon an individual, or an individual acting in a representative capacity, by:

(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or

(4) serving his agent as provided by rule, statute or valid agreement.

(B) *Copy service to be followed with mail.* Whenever service is made under subsection (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

• • •

Trial Rule 4.4

SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

(A) *Acts serving as a basis for jurisdiction.* Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

• • •

(5) owning, using, or possessing any real property or an interest in real property within this state; or

• • •

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising from an Indiana judgment for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) as provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions);

• • •

Trial Rule 4.11

SUMMONS: REGISTERED OR CERTIFIED MAIL

Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court or a governmental agent under Rule 4.10 shall send the summons and complaint to the person being served at the address supplied upon the summons, or, if none is furnished, to his known address or last known address as can otherwise be determined. In his return the clerk of the court or the governmental agent shall show the date and place of mailing a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become a part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested. When service is made by registered or certified mail only those persons of suitable age and discretion designated to receive service of process under Rule 4.1(1) through (4) may accept such service.

1970 AMENDMENTS TO RULES OF TRIAL PROCEDURE

Trial Rule 4.1

SUMMONS: SERVICE ON INDIVIDUALS

(A) • • •

(1) • • •

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode.

(4) • • •

(As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment deleted the words "with some person of suitable age and discretion residing therein; or" at the end of subdivision (A)(3).

Trial Rule 4.4

SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

(A) • • •

(1) • • •

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) • • •

(As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment deleted the words "arising from an Indiana judgment" following the words "as to all obligations" in subdivision (A)(7).

Trial Rule 4.11

SUUMONS: REGISTERED OR CERTIFIED MAIL

Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court or a governmental agent under Rule 4.10 shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court or the governmental agent shall show the date and place of mailing, a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become a part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service. (As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment substituted the words "or furnished by the person seeking service" for "or, if none is furnished, to his known address or last known address as can otherwise be determined" at the end of the first sentence, and deleted the last sentence which read: "When service is made by registered or certified mail only those persons of suitable age and discretion designated to receive service of process under Rule 4.1(1) through (4) may accept such service," and added the clause at the end following the words "as requested."

• • •